

JUDY SCHWARTZENBERGER,  
Plaintiff,  
  
v.  
  
MICHAEL J. ASTRUE,  
Commissioner of Social  
Security,  
  
Defendant.

)  
) No. CV-07-0013-CI  
)  
) ORDER GRANTING PLAINTIFF'S  
) MOTION FOR SUMMARY JUDGMENT  
) AND REMANDING FOR AN  
) IMMEDIATE AWARD OF BENEFITS  
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BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 13, 24.) Attorney Maureen Rosette represents Judy Schwartzenberger (Plaintiff); Special Assistant United States Attorney Franco L. Becia represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, and remands the matter to the Commissioner for an immediate award of benefits.

On February 5, 2001, Plaintiff protectively applied for Social Security Income (SSI) benefits. (Tr. 173-76.) Plaintiff alleged disability due to severe depression, with an onset date of September

1 1997.<sup>1</sup> (Tr. 193.) Benefits were denied initially and on  
2 reconsideration. (Tr. 91.) Plaintiff requested a hearing before  
3 an administrative law judge (ALJ), which was held before ALJ Paul  
4 Gaughen on September 17, 2002; a supplemental hearing was held on  
5 October 9, 2003. (Tr. 594-639, 640-67.) Plaintiff appeared with  
6 counsel and testified. Her daughter testified as a lay witness.  
7 (Tr. 595.) ALJ Gaughen denied benefits, Plaintiff requested a  
8 review, and the Appeals Council remanded the case for further  
9 proceedings on June 30, 2004. (Tr. 138-40.) Additional evidence  
10 was received, and a new hearing was held before ALJ Gaughen on March  
11 3, 2005. Plaintiff, medical expert Ronald Klein, Ph.D, and  
12 vocational expert Daniel McKinney testified. (Tr. 668-705.)  
13 Benefits were denied, and Plaintiff requested another review by the  
14 Appeals Council, which was granted. The case was remanded for a new  
15 hearing on November 9, 2005, and reassigned to ALJ R.J. Payne. (Tr.  
16 158-60.) A fourth and final hearing was held on May 15, 2006, at  
17 which Plaintiff and Dr. Klein testified. (Tr. 707.) Plaintiff was  
18 represented by counsel throughout these proceedings.

19 ALJ Payne denied benefits on July 28, 2006, and the Appeals  
20 Council denied review. The instant matter is before this court  
21 pursuant to 42 U.S.C. § 405(g).

#### 22 STATEMENT OF THE CASE

23 The facts of the case are set forth in detail in the transcript  
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25 <sup>1</sup> Since there is no retroactivity of benefits payment under  
26 Title XVI of the Social Security Act, onset is established on the  
27 date of filing for SSI benefits, provided claimant was disabled on  
28 that date. *Social Security Ruling (SSR)* 83-20.

1 of proceedings, and are briefly summarized here. At the time of the  
2 last hearing, Plaintiff was 46 years old. She had completed tenth  
3 grade, and did not obtain her high-school equivalency degree. She  
4 lived with her significant other, their four-year-old and a sixteen-  
5 year-old sons by a former spouse. She also had four other children  
6 who lived with her former spouse. (Tr. 724-25.) She had past work  
7 experience at her former spouse's small used car lot, where she  
8 helped him manage the business, sold vehicles and did basic  
9 paperwork associated with the sales. (Tr. 726.) Plaintiff  
10 testified she could not sustain work due to depression, anxiety,  
11 fatigue, pain, and extreme diarrhea caused by her chronic illnesses.  
12 (Tr. 731-37, 744.)

#### 13 ADMINISTRATIVE DECISION

14 At step one, ALJ Payne found Plaintiff had not engaged in  
15 substantial gainful activity during the relevant time. (Tr. 23.)  
16 At step two, he found: "The claimant has the following severe  
17 impairments: mild affective and personality disorders, influenced  
18 and/or exacerbated by substance abuse. Physically, she has been  
19 treated for Grave's disease, Crohn's disease, reactive airway  
20 disease and hypothyroidism." <sup>2</sup> At step three, he determined that  
21 "[o]ther than Section Listing 12.09 for substance abuse disorders,

22 \_\_\_\_\_  
23 <sup>2</sup> Although this finding is somewhat unclear, references to  
24 Plaintiff's Grave's disease, Crohn's disease, reactive airway  
25 disease and hypothyroidism (which are established by medical  
26 evidence in the record) are included in the ALJ's Finding 2, which  
27 enumerates severe impairments. Therefore, these physical conditions  
28 are construed as "severe" for purposes of step two findings.

1 . . . claimant's alleged medical conditions, singularly or in  
2 combination, did not meet or medically equal one of the listed  
3 impairments in 20 C.F.R., Appendix 1, Subpart P, Regulations No. 4  
4 (Listings)." (Tr. 26.)

5 At Finding 4, the ALJ determined:

6 After careful consideration of the entire record, the  
7 undersigned finds that the claimant has no physical or  
8 exertional limitations, but she should avoid work  
9 involving machinery, unprotected heights such as ladders,  
10 ropes and scaffolding, or exposure to airborne pollutants;  
11 and she has "moderate" limitations for social  
interaction/functioning, specifically interacting with the  
public, working in coordination with or in close proximity  
to others/co-workers, and accepting/ responding  
appropriately to criticism.

12 (Tr. 26.) He found Plaintiff's statements regarding her symptoms  
13 "not entirely credible." (Tr. 29.) The ALJ concluded Plaintiff was  
14 unable to perform any past relevant work. (Tr. 29.) Proceeding to  
15 step five and relying on vocational expert testimony from the March  
16 3, 2005, hearing, the ALJ found that Plaintiff could perform other  
17 work in the national economy and was therefore not disabled as  
18 defined by the Social Security Act. (Tr. 31.)

#### 19 STANDARD OF REVIEW

20 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
21 court set out the standard of review:

22 A district court's order upholding the Commissioner's  
23 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
24 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
25 Commissioner may be reversed only if it is not supported  
26 by substantial evidence or if it is based on legal error.  
27 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
28 Substantial evidence is defined as being more than a mere  
scintilla, but less than a preponderance. *Id.* at 1098.  
Put another way, substantial evidence is such relevant  
evidence as a reasonable mind might accept as adequate to  
support a conclusion. *Richardson v. Perales*, 402 U.S.  
389, 401 (1971). If the evidence is susceptible to more  
than one rational interpretation, the court may not

1 substitute its judgment for that of the Commissioner.  
2 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*  
3 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

4 The ALJ is responsible for determining credibility,  
5 resolving conflicts in medical testimony, and resolving  
6 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
7 Cir. 1995). The ALJ's determinations of law are reviewed  
8 *de novo*, although deference is owed to a reasonable  
9 construction of the applicable statutes. *McNatt v. Apfel*,  
10 201 F.3d 1084, 1087 (9th Cir. 2000).

### 11 SEQUENTIAL PROCESS

12 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
13 requirements necessary to establish disability:

14 Under the Social Security Act, individuals who are  
15 "under a disability" are eligible to receive benefits. 42  
16 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
17 medically determinable physical or mental impairment"  
18 which prevents one from engaging "in any substantial  
19 gainful activity" and is expected to result in death or  
20 last "for a continuous period of not less than 12 months."  
21 42 U.S.C. § 423(d)(1)(A). Such an impairment must result  
22 from "anatomical, physiological, or psychological  
23 abnormalities which are demonstrable by medically  
24 acceptable clinical and laboratory diagnostic techniques."  
25 42 U.S.C. § 423(d)(3). The Act also provides that a  
26 claimant will be eligible for benefits only if his  
27 impairments "are of such severity that he is not only  
28 unable to do his previous work but cannot, considering his  
age, education and work experience, engage in any other  
kind of substantial gainful work which exists in the  
national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,  
the definition of disability consists of both medical and  
vocational components.

21 In evaluating whether a claimant suffers from a  
22 disability, an ALJ must apply a five-step sequential  
23 inquiry addressing both components of the definition,  
24 until a question is answered affirmatively or negatively  
25 in such a way that an ultimate determination can be made.  
26 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The  
27 claimant bears the burden of proving that [s]he is  
28 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
1999). This requires the presentation of "complete and  
detailed objective medical reports of h[is] condition from  
licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
404.1512(a)-(b), 404.1513(d)).

27 It is the role of the trier of fact, not this court, to resolve  
28 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence

1 supports more than one rational interpretation, the court may not  
2 substitute its judgment for that of the Commissioner. *Tackett*, 180  
3 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
4 If there is substantial evidence to support the administrative  
5 findings, or if there is conflicting evidence that will support a  
6 finding of either disability or non-disability, the finding of the  
7 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
8 1230 (9<sup>th</sup> Cir. 1987). Nevertheless, a decision supported by  
9 substantial evidence will still be set aside if the proper legal  
10 standards were not applied in weighing the evidence and making the  
11 decision. *Browner v. Secretary of Health and Human Services*, 839  
12 F.2d 432, 433 (9<sup>th</sup> Cir. 1988).

### 13 ISSUES

14 The question is whether the ALJ's decision is supported by  
15 substantial evidence and free of legal error. Plaintiff argues the  
16 ALJ improperly rejected her testimony, improperly relied on medical  
17 expert testimony, and improperly rejected the opinions of examining  
18 psychologists. (Ct. Rec. 14 at 13, 15, 19.)

### 19 DISCUSSION

#### 20 A. Credibility

21 Plaintiff argues the ALJ improperly rejected her testimony  
22 regarding limitations caused by Crohn's disease and hypothyroidism  
23 over the last five years. (Ct. Rec. 14 at 17-18.) At the hearing  
24 before ALJ Payne, Plaintiff testified she had about three Crohn's  
25 attacks per month and chronic diarrhea. She reported an attack  
26 causes her severe cramps and spasms that double her over in pain and  
27 require her to go to the bathroom up to four times a day for up to  
28 forty-five minutes. (Tr. 736-39.) She also testified that due to

1 her Grave's disease, her thyroid was removed, and she had ongoing  
2 problems adjusting her thyroid medication. She stated symptoms  
3 relating to her resulting hypothyroidism and attempts to medicate  
4 were extreme joint pain, fatigue, and alternate periods of  
5 hyperactivity, anxiety and sleeplessness. (Tr. 731-33.) She also  
6 testified the only reason she could do her past work was because she  
7 worked for her spouse and he was very tolerant of her absences and  
8 mood swings. (Tr. 738.) Plaintiff's testimony in 2006 is  
9 consistent with her testimony at the March 3, 2005, hearing, where  
10 she described her hypothyroidism symptoms and her Crohn's attacks.  
11 At the 2005 hearing, Plaintiff stated these attacks occurred for  
12 months and would come on suddenly, causing her to need a bathroom  
13 quickly. (Tr. 690-91.)

14 In his credibility finding, ALJ Payne stated: "After  
15 considering the evidence of record, the undersigned finds that the  
16 claimant's medically determinable impairments could reasonably be  
17 expected to produce the alleged symptoms, but that the claimant  
18 statements concerning the intensity, duration and limiting effects  
19 of these symptoms are not entirely credible." (Tr. 29.)

20 When an ALJ finds the claimant's testimony as to the severity  
21 of impairments, symptoms and pain is unreliable, he must make a  
22 credibility determination with findings sufficiently specific to  
23 permit the court to conclude the ALJ did not arbitrarily discredit  
24 claimant's testimony. *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9<sup>th</sup>  
25 Cir. 2002); *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9<sup>th</sup> Cir. 1991)  
26 (en banc). While the ALJ cannot disregard a claimant's subjective  
27 complaints regarding the severity of symptoms solely because there  
28

1 is a lack of objective medical evidence to support the testimony,  
2 there must be some objective medical evidence of an impairment for  
3 the time at issue. *Bunnell, supra*.

4 In assessing credibility, the ALJ may consider the following  
5 factors when weighing the claimant's credibility: the claimant's  
6 reputation for truthfulness, inconsistencies either in her  
7 allegations of limitations or between her statements and conduct,  
8 her daily activities and work record, and testimony from physicians  
9 and third parties concerning the nature, severity, and effect of the  
10 alleged symptoms. *Thomas*, 278 F.3d at 958-959; *Light v. Social Sec.*  
11 *Admin.*, 119 F.3d 789, 792 (9<sup>th</sup> Cir. 1997). The ALJ "must  
12 specifically identify the testimony she or he finds not to be  
13 credible and must explain what evidence undermines the testimony."  
14 *Holohan v. Massanari*, 246 F.3d 1195, 1208 (9<sup>th</sup> Cir. 2001)(citation  
15 omitted).

16 If there is no affirmative evidence that the claimant is  
17 malingering, the ALJ must provide "clear and convincing" reasons for  
18 rejecting the claimant's allegations regarding the severity of  
19 symptoms. *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir. 1998). An  
20 adjudicator must not draw inferences about an individual's symptoms  
21 and their functional effects from a failure to seek or pursue  
22 regular medical treatment without first considering claimant's  
23 explanation for his or her failure to seek treatment. *SSR 96-7p*.  
24 Such explanations may include that the claimant is living with  
25 symptoms; financial concerns prevent the claimant from seeking  
26 treatment; the claimant has been told that there is no further,  
27 effective treatment that would be of benefit; and that the claimant  
28 may structure his or her daily activities so as to minimize symptoms



1 to a tolerable level or eliminate them entirely. *Id.*

2 Here, the ALJ found Plaintiff's Crohn's, hypothyroidism and  
3 Grave's diseases<sup>3</sup> were severe impairments. (Tr. 23.) Plaintiff's  
4 complaints are consistent with a diagnosis of Crohn's disease and  
5 hypothyroidism resulting from removal of her diseased thyroid. At  
6 the March 3, 2005, hearing Dr. Klein testified that Plaintiff's  
7 Crohn's disease, hypothyroidism, and asthma, were "all relevant

8 \_\_\_\_\_  
9 <sup>3</sup> Crohn's disease is a chronic inflammatory bowel disease,  
10 causing abdominal pain and diarrhea. It may also cause rectal  
11 bleeding, and weight loss; the range and severity of the symptoms  
12 vary. Treatment for relief of symptoms may lower the number of  
13 recurrences, but there is no cure. Predicting when symptoms will  
14 return is not possible. U.S. National Library of Medicine and  
15 National Institutes of Health (NIH), National Institute of Diabetes  
16 and Digestive and Kidney Disease, *Digestive Disease Information*  
17 *Clearinghouse: Crohn's Disease* (August 2007) (available at  
18 <http://www.nlm.nih.gov/medlineplus/crohnsdisease.html>).

19 Grave's disease is an autoimmune disorder that is caused by "an  
20 abnormal immune system response that attacks the thyroid gland and  
21 causes too much production of thyroid hormones." Symptoms include  
22 fatigue, nervousness, double vision, weight loss, frequent bowel  
23 movements and muscle weakness. Surgical removal of the diseased  
24 thyroid is a recognized treatment option and results in the lifelong  
25 use of replacement thyroid hormones. U.S. National Library of  
26 Medicine and National Institutes of Health (NIH), *Medical*  
27 *Encyclopedia, Graves Disease* (August 2007), (available at  
28 <http://www.nlm.nih.gov/medlineplus/ency>).

1 issues" because, although all were treatable, they were all things  
2 that "can reduce a person's ability to perform substantive gainful  
3 activity and to adapt generally psychologically." (Tr. 678.)  
4 Consistent with this testimony is medical evidence from CHAS clinic  
5 documenting treatment for Plaintiff's chronic conditions, including  
6 Crohn's, and efforts to adjust her thyroid medication. (Tr. 512-20,  
7 560-76.) In November 2002, Dr. Rubin reported that Plaintiff was  
8 suffering the "diarrhea stage" of her Crohn's affliction, which had  
9 been inactive in 2001. (Tr. 473.) This also is consistent with  
10 Plaintiff's testimony in 2005 and 2006. (Tr. 690, 735.)

11 The ALJ briefly summarized Plaintiff's testimony (Tr. 27) and  
12 made the conclusory finding that Plaintiff's subjective complaints  
13 regarding her limitations were less than credible, without  
14 identifying what portions of her testimony he found not credible and  
15 without explaining what evidence undermines her testimony.  
16 According to the Commissioner's policy, this type of conclusory  
17 statement is not sufficiently specific to reject a claimant's  
18 statements.<sup>4</sup> SSR 96-7p.

19 \_\_\_\_\_  
20 <sup>4</sup> Although the ALJ referenced objective testing evidence of  
21 symptom over-reporting and poor motivation (Tr. 28), the court notes  
22 on independent review that at the March 2005 hearing, Dr. Klein  
23 opined Plaintiff's elevated testing scores represented "a general  
24 expression of emotional distress that has some validity to it,"  
25 rather than malingering. (Tr. 679.) The examining psychologist who  
26 administered the tests likewise found no malingering and emphasized  
27 the scores could indicate "a plea for help by a extremely anxious  
28 individual." (Tr. 278, 280.)

1 The court will not infer lack of credibility. *Murray v.*  
2 *Heckler* 722 F.2d 499, 502 (9<sup>th</sup> Cir. 1983). The ALJ's failure to give  
3 "clear and convincing" reasons for rejecting Plaintiff's testimony  
4 at the March 2005 and May 2006 hearings regarding her fatigue, pain,  
5 and need for extended bathroom breaks four times a month is  
6 reversible error. *Benecke v. Barnhart*, 379 F.3d 587, 593 (9<sup>th</sup> Cir.  
7 2004); *Lester v. Chater*, 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995).

8 **B. Reliance on Medical Expert Testimony**

9 Plaintiff argues the ALJ erroneously relied on the testimony of  
10 a non-examining medical expert and improperly rejected the opinions  
11 of examining psychologists that she had "moderate" and "marked"  
12 limitations stemming from psychological disorders. (Ct. Rec. 14 at  
13 15-16.)

14 Courts have upheld an ALJ's decision to reject the opinion of  
15 an examining physician based in part on the testimony of a non-  
16 examining medical advisor. *Lester*, 81 F.3d at 831. The testimony  
17 of a medical expert may serve as substantial evidence only when  
18 supported by other evidence in the record. *Id.* However, if the ALJ  
19 rejects contradicted opinions from examining medical sources, he  
20 must give specific and legitimate reasons for disregarding those  
21 opinions. To meet this burden, the ALJ can set out a detailed and  
22 thorough summary of the facts and conflicting clinical evidence,  
23 state his interpretation of the evidence, and make findings.  
24 *Thomas*, 278 F.3d at 957. Historically, the courts have recognized  
25 conflicting medical evidence, the absence of regular medical  
26 treatment during the alleged period of disability, and the lack of  
27 medical support for doctors' reports based substantially on a

1 claimant's subjective complaints of pain, as specific, legitimate  
2 reasons for disregarding a treating or examining physician's  
3 opinion. *Lester*, 81 F.3d at 831 (quoting *Gallant v. Heckler*, 753  
4 F.2d 1450, 1456 (9<sup>th</sup> Cir. 1984); see also *Flaten v. Secretary of*  
5 *Health and Human Servs.*, 44 F.3d 1453, 1463-64 (9<sup>th</sup> Cir 1995); *Fair*  
6 *v. Bowen*, 885 F.2d 597, 604 (9<sup>th</sup> Cir. 1989).

7 Here, ALJ Payne found that, based on evidence from Dr. Klein,  
8 claimant "would not even have a mental diagnosis without her history  
9 of substance abuse." (Tr. 28.) He reasoned that Dr. Klein's  
10 assessment that Plaintiff's affective-mood disorder was "not severe"  
11 without the consideration of substance abuse was "clearly the same  
12 as all other examining opinions" evaluated in his decision. (Tr.  
13 27.) This finding is not supported by substantial evidence. For  
14 example, in 2004, Dr. Arnold noted "marked" limitations in  
15 Plaintiff's ability to (1) carry out detailed instructions; (2)  
16 maintain attention and concentration for extended periods; (3) work  
17 in coordination with or proximity to others without being  
18 distracted; (4) complete a normal workday without interruption from  
19 psychological problems; and (5) perform at a consistent pace without  
20 an unreasonable number and length of rest periods. (Tr. 492.) In  
21 February 2001, Dr. Bailey found "marked" limitations in Plaintiff's  
22 ability to exercise judgment and make decisions and relate  
23 appropriately to co-workers and supervisors. (Tr. 295.) These  
24 opinions were neither specifically referenced in the decision nor  
25 rejected under the legal standards discussed above. Rather, the ALJ  
26 found that "moderate" and "marked" mental capacity limitations in  
27 the record are "generally refuted by the accompanying clinical  
28

1 report of the evaluation." (Tr. 28.) He also referenced objective  
2 test evidence of symptom over-reporting, poor motivation and  
3 asserted that "claimant's diagnoses were 'controlled with  
4 medication' and 'in remission with medication.'" This generalized  
5 reasoning, without identifying the limitations rejected and the  
6 basis for the rejection, is not sufficiently specific to meet the  
7 Commissioner's burden in rejecting the examining psychologists'  
8 opinions. See *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9<sup>th</sup> Cir. 1996).

9 Regarding Plaintiff's substance abuse issues,<sup>5</sup> an independent

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10  
11 <sup>5</sup> Where substance abuse/addiction is a consideration during the  
12 sequential evaluation, the Regulations implemented by the  
13 Commissioner require the ALJ to follow a specific two-step analysis.  
14 20 C.F.R. §§ 404.1535(a), 416.935(a). First, the ALJ must conduct  
15 the five-step inquiry without attempting to determine the impact of  
16 substance abuse/addiction. If the ALJ finds that the claimant is  
17 not disabled under the five-step inquiry, the claimant is not  
18 entitled to benefits and there is no need to proceed with further  
19 analysis. *Id.* If the ALJ finds that claimant is disabled, and  
20 there is evidence of substance abuse, the ALJ should conduct a  
21 second sequential evaluation to determine if the claimant would  
22 still be disabled absent the substance abuse. *Bustamante v.*  
23 *Massanari*, 262 F.3d 949, 955 (9<sup>th</sup> Cir. 2001). Here, the ALJ did not  
24 conduct a two step analysis. Further, there is no finding that  
25 substance addiction disorder is a "severe" impairment at step two  
26 (Tr. 23); therefore, an assertion that Plaintiff met the Section  
27 Listing 12.09 for substance abuse disorders (Tr. 26, No. 3) is  
28 inconsistent with 20 C.F.R. § 416.920(a)(4)(iii) and (iv) (only if

1 review of examining psychologist reports shows that Mahlon Dalley,  
2 Ph.D., and Dr. Bailey did not diagnose substance abuse or chemical  
3 dependency in January and February 2001. (Tr. 282, 291.) In his  
4 2004 and 2006 evaluations, Dr. Arnold did not diagnose active  
5 substance abuse disorder or substance abuse disorder in remission or  
6 indicate that Plaintiff's limitations were effected by substance  
7 abuse. (Tr. 487, 489, 581.) In October 2004, Joyce Everhart,  
8 Ph.D., diagnosed alcohol dependence and methamphetamine dependence  
9 in remission, by history and record, as well as dysthymic disorder,  
10 anxiety disorder, dissociative disorder and psychotic disorder.  
11 (Tr. 506.)

12 Medical expert testimony is consistent with these diagnoses.  
13 For example, Scott Mabee, Ph.D., testified in October 2003, that  
14 while there was some evidence of substance abuse, the most exact  
15 diagnosis was dysthymic disorder. He opined that substance abuse  
16 should not be an active diagnosis because the evidence showed a 20-  
17 month remission. (Tr. 654.) At the March 2005 hearing, Dr. Klein  
18 testified dysthymic disorder was "a reasonable diagnosis," and  
19 opined that, "[i]t's really an open question as to whether there  
20 would be dysthymia without the drug abuse over the course of the  
21 years." (Tr. 677.) At both the 2005 and 2006 hearings, Dr. Klein  
22 testified substance abuse was probably not an issue after April  
23 2002. (Tr. 681-82, 720.) Thus, the record in its entirety is  
24 unclear as to what, if any, impact alcohol or drug use had on

25 \_\_\_\_\_  
26 an impairment is determined "severe" does the evaluation proceed to  
27 step three to determine if the severity meets or equals the Listing)  
28 and 20 C.F.R. §416.935, *supra*.

1 Plaintiff's psychological condition. This problematic interplay  
2 between substance abuse and mental illness has been addressed by the  
3 Commissioner, who advised that when it is unclear from the record  
4 what effects are caused by alleged substance abuse and what are  
5 caused by claimant's mental disorders, claimant should be given the  
6 benefit of the doubt, and a finding that substance abuse is not a  
7 contributing factor is appropriate. *Cox, Dale, Social Security*  
8 *Administration, Emergency Teletype, August 30, 1996, available at*  
9 [www.ssas.com/daa-q&a.htm](http://www.ssas.com/daa-q&a.htm); see also *McGoffin v. Barnhart*, 288 F.3d  
10 1248, 1253 (10<sup>th</sup> Cir. 2002) (citing the Social Security  
11 Administration's teletype).

12 Because Dr. Klein's purported testimony that Plaintiff's mental  
13 impairments were "not severe" without consideration of substance  
14 abuse is not supported by other evidence, including Dr. Klein's  
15 prior testimony, it was improperly relied upon by ALJ Payne as a  
16 basis for rejecting the examining psychologists' severity findings.<sup>6</sup>  
17 Further, because the ALJ did not give specific or legitimate reasons  
18 for rejecting the "marked" limitations opined by Drs. Bailey and  
19 Arnold, those opinions are credited as a matter of law. *Lester*, 81  
20 F.3d at 834.

### 21 **C. Remedy**

22 There are two remedies where the ALJ fails to provide adequate  
23 reasons for rejecting the opinions of examining physicians. The  
24 general rule, found in the *Lester* line of cases, is that "we credit  
25

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26 <sup>6</sup> Even if substance abuse were found "severe," there is no  
27 evidence that it would be material to the severity of Plaintiff's  
28 symptoms from Crohn's disease and hypothyroidism.

1 that opinion as a matter of law." *Id.*; see also *Smolen v. Chater*,  
2 80 F.3d 1273, 1291-92 (9<sup>th</sup> Cir. 1996); *Pitzer v. Sullivan*, 908 F.2d  
3 502, 506 (9<sup>th</sup> Cir. 1990); *Hammock v. Bowen*, 879 F.2d 498, 502 (9<sup>th</sup>  
4 Cir. 1989). Under the alternate approach found in *McAllister v.*  
5 *Sullivan*, 888 F.2d 599 (9<sup>th</sup> Cir. 1989), a court may remand to allow  
6 the ALJ to provide the requisite specific and legitimate reasons for  
7 disregarding the opinion. See also *Salvador v. Sullivan*, 917 F.2d  
8 13, 15 (9<sup>th</sup> Cir. 1990) (citing *McAllister*). The *McAllister* approach  
9 appears to be disfavored where the ALJ fails to provide any reasons  
10 for discrediting a medical opinion. See *Pitzer, supra*; *Winans v.*  
11 *Bowen*, 853 F.2d 643 (9<sup>th</sup> Cir. 1987).

12 Case law requires an immediate award of benefits when:

13 (1) the ALJ has failed to provide legally sufficient  
14 reasons for rejecting [a medical opinion], (2) there are  
15 no outstanding issues that must be resolved before a  
16 determination of disability can be made, and (3) it is  
clear from the record that the ALJ would be required to  
find the claimant disabled were such evidence credited.

17 *Harman*, 211 F.3d at 1178 (citing *Smolen*, 80 F.3d at 1292).

18 Improperly rejected claimant testimony is also credited as  
19 true. *Lester*, 81 F.3d at 834; *Varney v. Secretary of Health and*  
20 *Human Services*, 859 F.2d 1396, 1401 (9<sup>th</sup> Cir. 1988)(*Varney II*).  
21 Plaintiff's credited testimony at the May 2006, hearing is  
22 consistent with her testimony before ALJ Gaughen in March 2005.

23 In making his step five determination that Plaintiff could  
24 perform work in the national economy, ALJ Payne relied on opinions  
25 given by vocational expert McKinney at the 2005 hearing, which were  
26 based on the hypothetical presented by ALJ Gaughen. (Tr. 31, 700-  
27 02.) Because ALJ Gaughen's hypothetical did not include the above  
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1 credited evidence, Mr. McKinney's testimony has no evidentiary  
2 value, and ALJ Payne's step five findings are not supported by  
3 substantial evidence. See *Embrey v. Bowen*, 849 F.2d 418, 423 (9th  
4 Cir. 1988) (vocational expert opinion that claimant can work has no  
5 evidentiary value if hypothetical does not accurately reflect the  
6 claimant's physical and mental limitations). However, when  
7 presented with the improperly rejected limitation of unpredictable  
8 and prolonged bathroom breaks, three to four times a day, Mr.  
9 McKinney testified this limitation would preclude regular  
10 employment. (Tr. 703.) Because this testimony established  
11 Plaintiff's inability to work, there is no utility to further  
12 proceedings. *Harman*, 211 F.3d at 1180; *Lewin v. Schweiker*, 654 F.2d  
13 631 (9<sup>th</sup> Cir. 1981) (remand for additional proceedings would simply  
14 delay receipt of benefits).

15 Crediting Plaintiff's improperly rejected testimony and  
16 statements in treatment records and "marked" limitations found by  
17 Dr. Bailey in 2001, the onset date is established as alleged. See,  
18 e.g., *Hammock*, 879 F.2d at 503; *Varney II*, 859 F.2d at 1401.

19 The delay in Plaintiff's disability proceedings, which started  
20 in February 2001, has been significant; the case has been remanded  
21 two times by the agency and heard by two ALJs at four hearings. The  
22 record is fully developed, and there are no other issues to be  
23 resolved. Further remand in this matter would serve no useful  
24 purpose. See *Benecke*, 379 F.3d at 597. Accordingly,

25 **IT IS ORDERED:**

26 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is  
27 **GRANTED** and this matter is remanded to the Commissioner for an  
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1 immediate award of benefits.

2 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 24**) is  
3 **DENIED;**

4 3. An application for attorney fees may be filed by separate  
5 motion.

6 The District Court Executive is directed to file this Order and  
7 provide a copy to counsel for Plaintiff and Defendant. Judgment  
8 shall be entered for Plaintiff and the file shall be **CLOSED**.

9 DATED August 31, 2007.

10  
11 S/ CYNTHIA IMBROGNO  
12 UNITED STATES MAGISTRATE JUDGE  
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